

BEFORE THE
Federal Communications Commission

WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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In The Matter of

Revision of Rules and Policies for the
Direct Broadcast Satellite Service

To: The Commission

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IB Docket No. 95-168
PP Docket No. 93-253

**COMMENTS
OF**

THE NATIONAL RURAL TELECOMMUNICATIONS COOPERATIVE

**NATIONAL RURAL
TELECOMMUNICATIONS COOPERATIVE**

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Dated: November 20, 1995

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SUMMARY

Under an agreement with Hughes Communications Galaxy, Inc. (HCG), NRTC, its members and affiliated companies currently market and distribute up to 150 channels of popular cable and broadcasting programming (DirectTv®) to rural households equipped with 18 inch DBS satellite receiving antennas. As a Multichannel Video Programming Distributor (MVPD), NRTC supports the Commission's efforts to guard against potential anti-competitive conduct by cable companies which seek to act in concert with related DBS providers.

The vertically-integrated cable programming industry stifles competition in the market for delivery of video programming by competing MVPDs. In light of the cable industry's barriers to competition from the DBS industry, NRTC strongly supports the Commission's proposed strengthening of pro-competitive rules and policies.

NRTC believes that the dominant position of cable operators in the multichannel video programming market is exacerbated by the Commission's Program Access rules which -- although recognizing the Commission's statutory authority to award damages -- fail to include specific provisions awarding damages or even providing for the return of overpayments for a Program Access violation. Further, as a direct result of exclusivity arrangements between vertically-integrated programmers and non-cable DBS licensees for

area unserved by cable, NRTC is unable to obtain access to critical programming for distribution via DBS. This loophole in the Program Access rules also should be closed.

NRTC urges the Commission to focus its pro-competitive efforts upon the dominant players in the national market for multichannel video programming: cable operators and their affiliated DBS MVPDs. There will not be full competition in the market for delivery of video programming until the Commission curbs the potential for anticompetitive conduct by the cable industry.

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COMMENTS
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THE NATIONAL RURAL TELECOMMUNICATIONS COOPERATIVE

Pursuant to Section 1.415 of the Rules and Regulations of the Federal Communications Commission ("Commission"), the National Rural Telecommunications Cooperative ("NRTC"), by its attorneys, hereby submits these Comments in response to the Notice of Proposed Rule Making ("Notice") concerning the Commission's proposal to amend its Direct Broadcast Satellite ("DBS") service rules.^{1/}

I. BACKGROUND

1. NRTC is a non-profit cooperative association comprised of 521 rural electric cooperatives and 231 rural telephone systems located throughout 49 states.

^{1/} Notice of Proposed Rule Making ("Notice"), 60 Fed. Reg. 55822 (November 3, 1995).

NRTC's mission is to assist member companies and affiliates in meeting the telecommunications needs of more than 60 million American consumers living in rural areas. Through the use of satellite distribution technology, NRTC is committed to extending the benefits of information, education and entertainment programming to rural America -- on an affordable basis and in an easy and convenient manner -- just like those services are available on cable in more populated areas of the country. NRTC seeks to ensure that rural Americans receive the same benefits of the information age as their urban counterparts.

2. NRTC provides high-powered DBS services to rural subscribers across the country. Under an Agreement with Hughes Communications Galaxy, Inc. ("HCG"), NRTC, its members and affiliated companies currently market and distribute up to 150 channels of popular cable and broadcast programming ("Direct TV®") to rural households equipped with 18-inch DBS satellite receiving antennas. Using C-Band technology, NRTC and its Members also currently market and distribute packages of satellite-delivered programming, called "Rural TV®," to Home Satellite Dish ("HSD") subscribers throughout the country. Accordingly, NRTC is engaged in the business of making available for purchase, by subscribers and customers, multiple channels of video programming. As a result, NRTC is a Multichannel Video Programming Distributor ("MVPD") pursuant to 47 C.F.R. § 76.1000(e).

II. COMMENTS

A. NRTC Supports the Commission's Pro-competitive Approach

1. In its Notice, the Commission proposed pro-competitive revisions to its DBS service rules. Specifically, the Commission stated that DBS licensees or operators that are affiliated with cable operators would not have the same incentive as DBS service providers without such affiliations to offer DBS services that compete with other MVPDs for subscribers. Notice, at ¶ 40. Rather, cable-affiliated entities would have an incentive to minimize competition from any DBS resources they control, and would coordinate their joint activities to maximize their combined profits. Notice, at ¶¶ 37, 40.

2. NRTC supports the Commission's efforts to guard against potential anticompetitive conduct by cable companies which seek to act in concert with related DBS providers. In Comments and Reply Comments filed in the Commission's Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, CS Docket No. 95-61, NRTC pointed out that the vertically-integrated cable programming industry stifles competition in the market for delivery of video programming by MVPDs.^{2/} NRTC explained that many of the basic Program Access problems identified by Congress in the Cable Consumer Protection and Competition Act of 1992 ("1992 Cable Act") remain uncorrected; and that, as the direct result of exclusivity arrangements by vertically-integrated

^{2/} NRTC Comments at 2, NRTC Reply Comments at 4.

programmers for areas unserved by cable, NRTC is unable to obtain access to critical programming for distribution via DBS. Instead of multiple MVPDs competing vigorously to provide a diversity of service offerings to DBS consumers, as envisioned by Congress, these types of exclusivity arrangements place the future of DBS solely in the hands of a few large, vertically-integrated cable programmers. NRTC stated its belief that DBS consumers will pay the price in inconvenience and higher retail rates, and DBS will suffer as an alternative distribution technology and a competitive force to cable. In light of the cable industry's barriers to competition from the DBS industry, NRTC strongly supports the Commission's proposed strengthening of pro-competitive rules and policies.

B. Cross-ownership Restrictions Need to be Clarified

1. NRTC shares the Commission's concern that:

cross-ownership between DBS operators and other MVPDs may present opportunities for anticompetitive strategic conduct that potentially has adverse effects at the firm or national level. Notice, at ¶ 34.

The Commission proposed that any DBS licensee or operator affiliated with another MVPD be permitted to control or use DBS channel assignments at only one of the orbital locations capable of full-CONUS transmission. Notice, at ¶ 40. The Commission also requested comment on whether particularly stringent standards should be adopted specifically for cable operators. Id.

2. NRTC believes that ownership or control of DBS channels by an entity affiliated with a cable MVPD would adversely affect competition in the program

distribution market nationwide. Many of the programs offered by vertically integrated cable systems are national, rather than local, in nature.^{3/} Furthermore, as the Commission has noted, the cable industry is becoming increasingly concentrated. Thus, NRTC urges the Commission to recognize that any restrictions on cross-ownership should be targeted against and limited to cross-ownership relationships between DBS operators and cable entities, rather than all MVPDs. Otherwise, cross-ownership restrictions could have the unintended effect of assisting cable operators in the concentration of their economic power by eliminating or reducing investment in DBS by non-cable entities. Such a policy would ultimately lessen the competitiveness of DBS vis-a-vis cable.

C. Vertically-integrated Programmers Must be Restricted

1. The Commission requested comment on whether cable-affiliated DBS MVPDs would gain a competitive advantage over other DBS operators by using various vertical foreclosure strategies to limit access to or raise the price of programming, and whether the Commission should thus impose service rules to ensure that competing DBS providers are not denied access to programming. Notice, at ¶ 57.

2. NRTC believes the dominant position of cable operators in the multichannel video programming market is exacerbated by the Commission's Program

^{3/} Thus, NRTC believes that the relevant market, for purposes of anticompetitive behavior and procompetitive rules, is a national market.

Access rules which -- although recognizing the Commission's statutory authority to award damages -- fail to include specific provisions awarding damages or even mandating the return of overpayments for a Program Access violation. Further, as the direct result of exclusivity arrangements between vertically-integrated programmers and non-cable DBS licensees for areas unserved by cable, NRTC is unable to obtain access to critical programming for distribution via DBS. NRTC pointed out in its Comments and Reply Comments filed in the Annual Assessment of Competition in the Delivery of Multichannel Video Programming proceeding, CS Docket No. 95-61, that in order to effectively promote nationwide competition in the provision of multichannel video programming, the Commission should forbid exclusivity arrangements which place the future of DBS solely in the hands of a few large, vertically-integrated cable programmers -- and should award damages for Program Access violations. See, e.g., NRTC Comments, CS Docket No. 95-61, at 2.

3. NRTC reiterates its position that the major cable companies continue to thwart the competitive potential of DBS by ignoring Program Access requirements. NRTC participated extensively in the Commission's proceeding implementing the Program Access provisions of the 1992 Cable Act.^{4/} Following adoption of the First Report and Order in that proceeding,^{5/} NRTC commended the Commission for its

^{4/} Notice of Proposed Rulemaking, MM Docket No. 92-265, 58 Fed. Reg. 328 (January 5, 1993); Comments and Reply Comments of NRTC, January 25 and February 16, 1993, respectively.

^{5/} Program Access Decision, 58 Fed. Reg. 27658 (May 11, 1993).

landmark decision to prohibit discrimination in the provision of video programming. NRTC pointed out in its Petition for Reconsideration ("Petition"), however, that the Commission's Program Access rules need to be significantly strengthened. Cf., 47 U.S.C. 628(c)(2)(C); 47 C.F.R. 76.102(c)(1).^{6/}

4. NRTC believes that the Commission's rules fail to fully implement the Congressional ban against exclusive arrangements by vertically integrated programmers in areas unserved by cable. As the Commission recognizes in this current Notice, the Program Access provisions of the 1992 Cable Act were designed by Congress to create a level playing field for all MVPDs. Notice, at ¶¶ 58, 59. The 1992 Cable Act directed the Commission to establish rules to prohibit exclusive arrangements which prevent MVPDs from obtaining programming from vertically-integrated programmers for distribution to persons in areas not served by cable. 47 U.S.C. 548(c)(2)(C). The Commission's implementing rule, however, failed to prohibit exclusive arrangements between vertically-integrated cable programmers and non-cable operator distributors.^{7/}

5. Vertical integration remains a serious impediment to competition to cable from DBS operators and distributors.^{8/} The cable industry has complete access

^{6/} See, Petition for Reconsideration of NRTC, MM Docket No. 92-265, June 10, 1993; denied, Memorandum Opinion and Order on Reconsideration of the First Report and Order (December 15, 1994); see also, Reply of NRTC, MM Docket No. 92-265, July 28, 1993.

^{7/} 47 C.F.R. 76.1002(c)(1).

^{8/} See United States v. Primestar Partners, 1994-1 Trade Cas. (CCH) ¶ 70,562 (S.D.N.Y. 1994), for instance, where vertically-integrated programming vendors tried unsuccessfully to block distribution of programming to potential competitors of

to this programming for distribution via cable, HSD and DBS. As a DBS distributor, however, NRTC has no access to any of the popular programming of certain large, vertically-integrated cable programmers. These cable programmers utilize exclusive, anti-competitive DBS distribution arrangements with non-vertically-integrated, non-cable operator/DBS distributors to block access by NRTC to their programming. This type of exclusivity is contrary to the spirit and specific language of the Program Access provisions of the Cable Act (47 U.S.C. 548(c)(2)(C)) and should be prohibited by the Commission's rules (47 C.F.R. 76.1002(c)(1)).

6. The Commission also should mandate clearly that significant damages will be awarded by the Commission for price discrimination and other Program Access violations. Otherwise, cable operators remain free to use their dominant positions in both programming and distribution markets to restrict the ability of non-cable-affiliated DBS MVPDs, such as NRTC, to obtain essential programming at fair and non-discriminatory prices. This situation enables a cable operator and its joint DBS affiliate to enjoy a de facto monopoly position in the national market for certain multichannel video programming, regardless of whether non-cable affiliated DBS MVPDs have access to full-CONUS orbital locations. At a bare minimum, the Commission should adopt rules to require that wholesale DBS programming services provided to cable operators using DBS licenses also be provided to competing

Primestar. The Department of Justice and attorneys general of 40 states commenced federal antitrust actions against Primestar for anticompetitive restrictions on cable programming access, and a consent decree was entered into restricting the use of exclusive agreements. Id.

MVPDs on nondiscriminatory terms and conditions; the Commission should also provide for awards of damages for violations of this mandate. Notice, at ¶ 62. Currently, the Commission's rules are woefully inadequate: following successful prosecution of a Program Access complaint, it is unclear whether an aggrieved MVPD will even be restored to the status quo by receiving a refund of demonstrated overpayments. This "loophole" in the Program Access rules must be closed.

D. Marketing Restrictions

1. Should the Commission determine to permit access by cable-affiliated DBS MVPDs to full-CONUS DBS locations, NRTC supports the Commission's proposal to place limitations on the conduct of such entities. Specifically, the Commission proposed to extend the restrictions it developed in Tempo II, 7 FCC Rcd at 2731, to non-DBS MVPDs which offer DBS service. Notice, at ¶ 55. These restrictions would prohibit non-DBS MVPDs from: 1) offering DBS service primarily as ancillary service to the services of affiliated cable systems; or 2) providing DBS service to subscribers of those systems under different terms than were offered to non-subscribers. Notice, at n. 73. Through the use of satellite distribution technology, NRTC provides rural Americans an affordable source of information and entertainment. For rural Americans, however, unchecked provision of DBS services by cable operators or their affiliated entities poses a threat of anticompetitive practices. Thus, the Commission should focus its determination and apply Tempo II

restrictions to the real cause of the problem: cable operators and cable-affiliated DBS MVPDs.

E. Operational Requirements

1. The Commission's Notice proposed new operational requirements for non-DBS services. Specifically, the Commission proposed that ancillary services would be permitted on a channel "capacity" basis rather than during a certain portion of the day. Notice, at ¶ 30. NRTC supports this proposal to the extent it affords operators maximum flexibility to make optimal use of DBS spectrum, provided that basic DBS requirements are satisfied.

F. Alaska and Hawaii

NRTC supports the Commission's proposal to extend DBS service to Alaska and Hawaii. Rural residents of Alaska and Hawaii currently are unable to obtain DBS service. NRTC endorses the Commission's plan to require future licensees and permittees to provide such service.

III. CONCLUSION

In order to promote a vibrant, competitive environment for delivery of multichannel video programming, the anticompetitive power of cable operators and their DBS affiliates must be addressed. NRTC urges the Commission to focus its

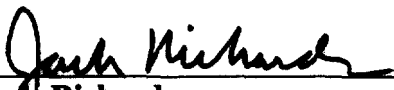
pro-competitive efforts upon the dominant players in the national market for multichannel video programming: the cable operators and their affiliated DBS MVPDs. NRTC believes that the Commission's proposal to extend the protections of Tempo II should be narrowly applied; otherwise, the Commission's restrictions might unintentionally thwart development of DBS as a competitor to cable service. NRTC submits that, ultimately, there will not be full competition in the market for delivery of video programming until the Commission curbs the potential for anticompetitive conduct by the cable industry.

WHEREFORE, THE PREMISES CONSIDERED, the National Rural Telecommunications Cooperative urges the Commission to consider these Comments and to revise its rules in accordance with the views expressed herein.

Respectfully submitted,

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Dated: November 20, 1995

CERTIFICATE OF SERVICE

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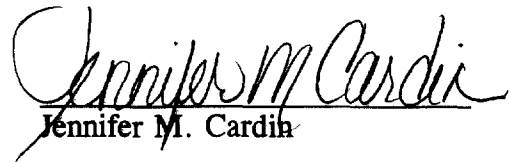
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